Supreme Court, U.S.
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(3)

No. 91-295

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES M. DOYLE, ET AL.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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December 6, 1991

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CHARLES M. DOYLE, ET AL.,

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THE UNITED STATES,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The United States contends "that in its present posture this case is not suitable for review by this Court". (Opp. 7).[1] It argues that the courts below

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[1] Defendant's Brief In Opposition to the petition for writ of certiorari is designated herein as "Opp. ___". The petition is designated as "Pet. ___". The appendix to the petition for writ of certiorari is designated as "A___". The supplemental appendix reprinted as part of this reply brief is designated as "SA__".

"did not resolve" the doubt "as to whether any of petitioners' claims were timely". (Opp. 7).

Respondent's assertion is legally incorrect and patently untrue. First, the United States did not raise this issue either before the Claims Court or the court of appeals. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-33 (1971); see 2A Moore's Federal Practice ¶ 8.27[3][4] and cases cited therein. Respondent certainly is barred from raising it for the first time at this juncture. *Air Courier Conference of America v. American Postal Workers Union*, 111 S.Ct. 913, 917 (1991).

Second, petitioners' claims for liquidated damages were resolved properly in accordance with rules of the Claims Court on the basis of cross-motions for summary judgment. (A15, 19).[2] Before the Claims

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[2] Rule 56(f) of the Rules of the United States Claims Court states:

> **Rule 56. Summary Judgment. . . .**
>
> **(f) Form of Affidavits; Further Testimony; Defense Required.** *See* Appendix H ¶ 1. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof

(continued...)

Court, petitioners presented the declarations of Michael DeJesus, Stephen P. Jenkens, Jackie P. Stafford, and George E. Stanley that they served on active duty in the Armed Forces of the United States for varying periods of time before they joined the action as plaintiffs sufficient to bring their claims within the limitations period. (SA1-4). Petitioners argued that those firefighters' claims were timely because the two-year limitations period must be tolled for the period of their active duty military service. See Soldiers' and Sailors' Civil Relief Act, *as amended*, 50 U.S.C. app. § 525. The United States did not offer any declarations, affidavits, or documentary evidence to refute petitioners' sworn declarations. As the Claims Court held in resolving the cross-motions for summary judgment: "The present facts are not in dispute. The

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[2](...continued)
referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis supplied).

outcome of the case, therefore, turns on whether one or the other party is entitled to judgment as a matter of law." (A19). It is settled law that summary judgment is appropriate when there are no genuine issues of material fact in dispute as alleged by the moving party which are supported by unrebutted declarations, affidavits or documentary evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); RUSCC 56(c).[3]

Third, petitioners also demonstrated to the Claims Court that many other claims were timely despite the two-year statute of limitations. Plaintiffs produced documents which established that a number of federal agencies did not begin to pay the proper amount of overtime pay to firefighters and law enforcement officers until months or even years after OPM's instructions on September 23, 1983. (SA12-13, 14, 16, 18). In support of its summary judgment motion, as an example, petitioners produced

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[3] Moreover, in response to petitioners' declarations of active military duty, respondent specifically informed the Claims Court that it would "not address their individual claims of legal 'disability'" on the cross-motions for summary judgment. Instead, respondent "respectfully request[ed] the Court to reserve that issue, pending a decision on the other issues of entitlement and equitable tolling" (Defendant's Reply to Plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment, p. 20 fn. 13, SA5-6). It ill behooves respondent now to argue that this case may not be reviewed by this Court because the Claims Court made "no findings" on which of petitioners' claims fell into those groups. (Opp. 7).

documentary evidence that plaintiffs Thomas W. Vogt and Donald L. Sova were not paid the proper amount of overtime pay for those pay periods which fell between September 22, 1983 and July 24, 1984. Such evidence was produced by federal agencies which employed those petitioners in response to requests for discovery. Inasmuch as it was undisputed that both petitioners filed their claims for liquidated damages on November 14, 1985, most of their "continuing claims" accrued less than two years before they had filed in a timely fashion in the Claims Court.[4] Petitioners specifically included in their First Amended Motion for Summary Judgment their claim that the limitations period be tolled for the four plaintiffs who had served on active military duty and that the court apply the "continuing claims" doctrine to those plaintiffs who filed within 2 years from any pay period in which defendant failed to pay them proper overtime pay. (SA9, ¶ 6-7). None of this evidence was refuted by the United States either in its opposition to plaintiffs' motion for summary judgment or in its cross-motion for summary judgment. On appeal, petitioners specifically referred to this evidence in their brief to the court of appeals and reproduced it in the appendix to their brief, again without rebuttal or refutation by the United States. (SA20-21).

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[4] The Court of Appeals recognized that where the employer fails to make proper overtime payments on time, a cause of action accrues with each deficient paycheck which are termed "continuing claims". (A30-31); *Cook v. United States*, 885 F.2d 848, 851 (Fed. Cir. 1988); *Daniels v. United States*, 407 F.2d 1345, 1346 n. 1 (Ct. Cl. 1969); *Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981).

Finally, contrary to respondent's assertion, the courts below did conclude that there were in fact timely claims. The Claims Court noted in its opinion that those plaintiffs who had "continuing claims" for overtime back pay, and those whose claims were tolled while serving on active military duty, were not barred by the statute of limitations. (A30-31). The court held: "It is only this defined group of claims, and those defined in section E below [Soldiers' and Sailors' Civil Relief Act claims], that are not barred by the statute of limitations and to which the liquidated damages section discussed below would apply." (A31). In Section E of its opinion, the Claims Court found that "[f]or plaintiffs who served on active military duty," the statute of limitations was tolled during the period of time served in the military on or after September 22, 1983. *Id.*

The court of appeals on *de novo* review affirmed the Claims Court's determination that there were no material factual disputes. (A11). As to the failure of other agencies to pay the appropriate amount of overtime payments when they were earned, it found that "[e]ven after issuance of the OPM directive in September 1983, the Government apparently did not immediately begin making overtime payments." (A6). The court of appeals went on to hold that the two-year limitations period "renders *most* of the claims in this case untimely." (A7). (emphasis supplied). The court of appeals noted the undisputed evidence produced by petitioners with respect to the continuing claims of plaintiffs. (A8). It then affirmed the Claims Court on the basis of *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Thus, both courts below considered the timeliness issue and found that there were

petitioners whose claims were timely. The case is suitable for review by this Court in its present posture. See *Stevens v. Department of the Treasury*, 111 S.Ct. 1562, 1567 (1991).

2. Contrary to respondent's assertion in footnote 4 of its Opposition (Opp. 7), the issue of mandatory liquidated damages under section 216(b) is fairly subsumed within the question set forth in the petition. Rule 14, Supreme Court Rules. The issues are entwined because the courts below had to dispose of the mandatory damages issue before ruling on the availability of discretionary damages. The circuit court enigmatically applied the government's pre-September 1983 "good faith" to the post-September 1983 claims (A6) without considering whether the agencies "had reasonable grounds" for failing to make those payments. 29 U.S.C. § 260. The Claims Court made the same error. (A32). See *Dybach v. State of Florida Department of Corrections*, 120 LC ¶ 35, 547 (11th Cir. Sept. 30, 1991). At footnote 3 of the petition, petitioners plainly identify the error of the court below in denying mandatory liquidated damages. Pet. 10-11, fn. 3. The Court has the authority to review this issue. See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 911 (1991); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980).

3. The Government suggests that liquidated damages may be awarded in FLSA cases for reasons other than as compensation for delay or lost interest. Therefore, it argues, the court of appeals was correct in distinguishing those liquidated damages which are sought for delay or interest which are prohibited by *Library of Congress v. Shaw*, *Id.*, from permissible

liquidated damages which were waived by Congress in § 216(b).

But, neither the court of appeals, the Claims Court, nor respondent could identify any reason other than interest or delay for the award of discretionary liquidated damages in the context of FLSA cases.

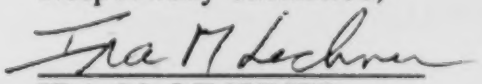
Indeed, the Claims Court held: "There may well be other reasons but this court is of the opinion that the most practicable reason for which plaintiffs might be awarded liquidated damages is to make up for the delay in receiving their back pay". (A37).

Petitioners' respectfully urge that if Congress explicitly waived the Government's sovereign immunity to suits for "liquidated damages" under § 216(b), and the only practicable reason for such damages is as compensation for delay, then the rationale of *Shaw* cannot bar petitioners' recovery.

CONCLUSION

For the reasons stated above and in the petition, a writ of certiorari should be granted.

Respectfully submitted,



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December 6, 1991 *Counsel of Record*

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF MICHAEL DEJESUS

Pursuant to 28 U.S.C. § 1746, I MICHAEL DEJESUS hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from October 1973 to March 1982 and from March 1986 to February 1988.

2. I have served on active duty in the Armed Forces of the United States from March 1982 to March 1986 and February 1988 to present.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: 14 April 89

Michael DeJesus

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF STEPHEN P. JENKENS

Pursuant to 28 U.S.C. § 1746, I STEPHEN P. JENKENS hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from September 1975 to September 1982.

2. I have served on active duty in the Armed Forces of the United States from November 1, 198? to present.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: 14 April 89

Stephen P. Jenkens

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF JACKIE P. STAFFORD

Pursuant to 28 U.S.C. § 1746, I JACKIE P. STAFFORD hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from January, 1979 to October, 1983.

2. I have served on active duty in the Armed Forces of the United States from October 3, 1983 to the present.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: 14 April 89

Jackie P. Stafford

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF GEORGE E. STANLEY

Pursuant to 28 U.S.C. § 1746, I GEORGE E. STANLEY hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from January, 1979 to March 1981.

2. I have served on active duty in the Armed Forces of the United States from March, 1981 to April, 1986.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: April 13, 1989

George E. Stanley

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, Plaintiffs,	)	
v.	)	C.A. No. 669-85C
UNITED STATES OF AMERICA, Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

* * * * * *

Plaintiffs have demonstrated no disability or other qualitative difference between themselves and the *Marren* plaintiffs, and should not, therefore, be permitted to hide behind their own ignorance or laxity and contend that exercise of their substantive rights was

in some manner derived from the issuance of a discovery order in *Cook I*.[13]

---

[13] Plaintiffs have produced the names of certain individuals whose claims were allegedly tolled during military service. To the extent that those plaintiffs would fall within the coverage of the Soldiers and Sailors Relief Act, 50 U.S.C. § 525, their claims present a different issue for resolution than the thousands of other plaintiffs in this case. We do not address their individual claims of legal "disability" here, and respectfully request the Court to reserve that issue, pending a decision on the other issues of entitlement and equitable tolling.

SUPPLEMENTAL APPENDIX C

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

PLAINTIFFS' FIRST AMENDED MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, respectfully move the Court as follows:

1. To order summary judgment in favor of persons who are plaintiffs in this cause;

2. To order that such plaintiffs shall recover of the defendant, the United States of America, liquidated damages to be determined according to the following formula:

> For overtime worked in calendar years 1978 to and including 1986, liquidated damages equal to 100 percent (100%) of the FLSA back pay previously paid for those years to such plaintiffs by defendant

pursuant to FPM Letter 551-20, dated September 22, 1983.

Defendant shall pay an additional 1.3 percent (1.3%) of back pay which previously was deducted by defendant as a Medicare contribution.[1]

3. To order that the Court toll the commencement of the running of the statute of limitations as to all plaintiffs from September 22, 1983 to the present time inasmuch as the government has not rectified its errors of omission in failing to inform employees of their rights to liquidated damages in FPM Bulletin 551-14 and in failing to post, "and keep posted", the FLSA notice in FPM Letter 551-8; **alternatively**, we requested that the commencement of the running of the limitations period be tolled from September 22, 1983 to the present time for each plaintiff who has filed a declaration that he had no actual knowledge of his right to sue the United States for liquidated damages until he was so informed less than two years before he "opted-in" as a plaintiff to this action.

4. **Alternatively**, to order that pursuant to the doctrine of *Honda v. Clark*, the commencement of the running of the statute of limitations be tolled for

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1 This paragraph is based on an Order entered by Judge Gasch in *Jones II* to which the Government raised no objection.

all plaintiffs until *Harnedy et al. v. United States* is concluded, or until October 31, 1986, the date that *Jones* was dismissed.

5. Alternatively, to order that as to any plaintiff who opted-in to this case after his or her name and address was produced by defendant, the running of the limitations period be tolled from the date plaintiffs made their demand for production on September 17, 1985 until sixty days after the date his or her name and address actually was produced.

6. To order that the limitations period be tolled during the period of active military service performed by plaintiffs Michael DeJesus, Stephen P. Jenkens, Jackie P. Stafford, and George E. Stanley.

7. To order that pursuant to the continuing claims doctrine, summary judgement should be awarded to those plaintiffs who filed their Consent Form less than two years form any pay period which ended after September 22, 1983, and in which defendant failed to pay the proper overtime pay.

8. To order summary judgment in favor of those plaintiffs whose Consent Forms were filed in this Court within two years of the date they were paid overtime backpay in compliance with FPM Bulletin 551-14.

9. To order that this action be continued pending the filing of the consent forms of additional plaintiffs within the statute of limitations and that a judgment for liquidated damages be ordered as to those additional plaintiffs on the same terms as the

judgement order which is applicable to the current plaintiffs.

10. To order that defendant be directed forthwith to compute and pay the amount of liquidated damages to which each individual firefighter or law enforcement officer is entitled; and that upon computation and payment of such amount, such plaintiff be given a worksheet showing the basis of the computation.

11. To order that at each installation, plaintiffs' counsel may designate a representative to examine on his behalf the computations and to forward a copy thereof to plaintiffs' counsel in any case in which there is a dispute.

12. To order that the aforesaid computation and payment be without prejudice to an individual plaintiff's opportunity to appeal administratively, and ultimately to the Court, any disagreement he or she may have with the amount specified.

13. To order the payment of reasonable attorney's fees if counsel for the parties cannot agree on an appropriate amount.

Respectfully submitted,

Ira M. Lechner
1899 L Street, NW
Suite 1250
Washington, DC 20036
(202) 659-4656

Counsel to Plaintiffs

DATED: September 29, 1989

SUPPLEMENTAL APPENDIX D

DEPARTMENT OF THE TREASURY
Washington

March 5, 1987

Dear Mr. Cohen:

This letter transmits information requested by your letter of October 6, 1986 in the matter of Charles M. Doyle, Jr., et al. v. United States, cl. ct. No. 660-85C.

The responding Treasury organizations are the Bureau of Alcohol, Tobacco and Firearms, the U.S. Customs Service, and the U.S. Secret Service. The Internal Revenue Service is responding directly to your office.

All organizations represented in the enclosed listings had difficulty in locating and extracting FLSA back overtime pay data from old pay records in the detail requested in your October 6 letter. Except for the uniformed Division of the Secret Service, which issued special earnings statements for a one-time retroactive payout in regular salary checks dated July 30, 1984, the active payout in regular salary checks dated July 30, 1984, the responding activities did not provide breakouts of amounts due for each pay period covered by the span of retroactivity. They did, however, provide information for each covered employee showing the total amount of FLSA back overtime pay, and the pay periods in which such payments were made.

We hope this information on total back pay will meet your needs. Retrieval of additional information to reflect earned overtime amounts by pay period for each covered employee during the entire period of retroactivity would require an extensive manual search of original hard copy documentation, and would place a heavy burden on the resources of the affected activities.

The experience of one responding bureau illustrates the potential workload associated with the gathering of retroactive earnings data by pay period. During the period of late 1984 through early 1986, the Customs Service paid out $2,178,170.34 to 1,314 individual Customs Officers as the result of 17,440 pay actions. In turn, each of these pay actions represents the cumulative total of several pay periods of overtime earnings extending back, in some cases, to 1978.

With respect to the information requested in Attachment C of your October 6 letter, no specific dates could be identified for the mailings of the overtime back pay paychecks. However, since the back pay was included in paychecks for regular pay periods in all cases, mailings or electronic transfers may be assumed to have preceded by two or three days the pay days for the pay periods shown. Further, no dates could be established for the actual receipt of back pay by the first or last employee involved in this matter.

Responding activities began paying correct FLSA overtime in accordance with FPM Bulletin No. 551-14 at different times, as follows:

Alcohol, Tobacco and Firearms		01-01-84
Customs Service		09-16-83
Secret Service	(Uniformed Div.)	07-30-84
	(All Others)	Nov/Dec 1984

Finally, the enclosed materials pertain to law enforcement personnel only. The Department of the Treasury does not employ firefighters. We have no information as to which, if any, of our current or former employees were involved in cases Jones v. Donovan and Lanehart v. Marshall.

If additional information is required, please contact William F. Casey, Assistant Director of Personnel (Classification, Pay and Program Evaluation). Mr. Casey's telephone number is 535-9445.

Sincerely,

Charlene J. Robinson
Acting Director of Personnel

Mr. David M. Cohen
Director, Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

Enclosure

SA15

DEPARTMENT OF THE ARMY
SENECA ARMY DEPOT
ROMULUS, NEW YORK 14541-5001

16 December 1986

SUBJECT: Backpay for Law Enforcement and Fire Protection Personnel

* * * * * *

Attachment C

Date Overtime Backpay Paychecks Were Mailed By Your Agency	July 11, 1984
Date First Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	July 13, 1984
Date Last Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	July 13, 1984
Date Firefighters and Law Enforcement Employees Began Receiving Correct Overtime	July 27, 1984

INTERNAL REVENUE SERVICE
MEMORANDUM

DATE: Jul 2, 1987

SUBJECT: Charles M. Doyle, Jr. et al. v. United States, Cl. Ct. No. 660-85C

* * * * * *

Attachment C

Date Overtime Backpay Paychecks Were Mailed By Your Agency	All monies paid as Overtime Back Pay was included with employees' regular salary payment received on October 20, 1986 (Pay date for Pay Period 22-86). Those employees who had separated were issued individual checks dated October 20, 1986.
Date First Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	October 20, 1986

Date Last Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	138 IRS employees (Attachment B) were paid back pay October 20, 1986. It is anticipated that approximately 60 additional employees will be entitled to Overtime Backpay. Currently, historical payroll data is being accumulated and reviewed for subsequent pay calculation. Anticipated date of payment for these employees - September, 1987. (See *NOTE, below).
Date Firefighters and Law Enforcement Employees Began Receiving Correct Overtime	Pay Period 05, 1985, beginning, February 17, 1985

*NOTE: All requested information, as provided in Attachment B, will be provided for these employees following completion of documentation review and pay calculation.

UNITED STATES DEPARTMENT OF AGRICULTURE
Agriculture Research Service
Personnel Division
Beltsville, Maryland 20705

Oct. 23, 1987

SUBJECT: Charles M. Doyle, Jr. et al. v. United States, C.I. No. 660-85C

* * * * * *

Attachment C

Date Overtime Backpay Paychecks Were Mailed By Your Agency	Checks were mailed directly by the Department of Treasury to employee. Identified on the attached is the date Treasury was authorized to make payment.
Date First Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	Unknown - see above
Date Last Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	Unknown - see above

Date Firefighters and Law Enforcement Employees Began Receiving Correct Overtime	03-18-85

SUPPLEMENTAL APPENDIX E

BRIEF AND APPENDIX FOR PLAINTIFFS-APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5148

CHARLES M. DOYLE and 4,428 OTHER NAMED PLAINTIFFS,

Plaintiffs-Appellants,

- v. -

THE UNITED STATES,

Defendant-Appellee.

---

* * * * * *

In resisting the government's cross-motion for summary judgment, appellants produced documentary evidence demonstrating that some of the plaintiffs were not paid

the proper amount of overtime for pay periods which ended after September 22, 1983 (A50, 52, 55, 57).[7]

---

[7] In the damages phase of this bifurcated litigation, each plaintiff's pay records must be examined. For example, plaintiffs Thomas W. Vogt (social security no. 116-48-4603) (A49) and Donald L. Sova (social security no. 067-44-7465) (A48) did not receive the correct amount of overtime pay in accordance with FPM Letter 551-20 until the pay period beginning July 27, 1984. Both plaintiffs-appellants filed their claim for liquidated damages in this case on November 14, 1985, less than two years after each of the pay periods which ended between November 14, 1983 and July 27, 1984. Under 29 U.S.C. § 216(b), they are entitled to 100% mandatory liquidated damages for each of those pay periods equal to the amount of additional overtime pay to which they were entitled by virtue of the new policy announced in FPM Letter 551-20.

As the letter to the Department of Justice from Charlene J. Robinson, Acting Director of Personnel of the Treasury Department (A51-52) demonstrates, these are not isolated instances inasmuch as the Bureau of Alcohol, Tobacco and Firearms did not begin paying the correct FLSA overtime until January 1, 1984; the Uniformed Division of the Secret Service did not begin to pay correctly until July 30, 1984; the non-uniformed division of Secret Service did not begin to pay correctly until November/December, 1984. The letter also inexplicably states that the Customs Service did not

(continued...)

While the United States established its "good faith" for the period between January 1, 1978 and September 22, 1983, there was no conceivable legal excuse for failing to pay the proper amount of overtime after September 22, 1983. And, none was offered in the Claims Court below.

* * * * * *

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[7](...continued)
begin paying correct overtime until September 16, 1983 in accordance with FPM Bulletin 551-14, but it was not issued until October 27, 1983 (A37) (presumably the Treasury Department meant that overtime pay was paid correctly beginning on September 16, 1984, not 1983). Appropriate discovery should clarify this date on remand.